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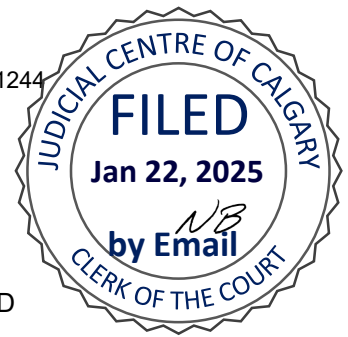
COURT  
JUDICIAL CENTRE

COURT OF KING'S BENCH OF ALBERTA  
CALGARY  
IN THE MATTER OF THE BANKRUPTCY AND  
INSOLVENCY ACT, RSC 1985, C B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF  
INTENTION TO MAKE A PROPOSAL OF CLEO  
ENERGY CORP.  
CLEO ENERGY CORP.

APPLICANT

C11244



COM  
Jan 22, 2025

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**SUPPLEMENTAL BENCH BRIEF OF THE RESPONDENT,  
TRAFIGURA CANADA LIMITED**

**FOR THE HEARING SCHEDULED IN JUDGE'S CHAMBERS  
ON January 22, 2025, AT 3:00 PM**

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## PART I – INTRODUCTION AND RELIEF SOUGHT

1. Trafigura Canada Limited (“**Trafigura**”) wishes to bring to the attention of this Honourable Court two further and additional recent cases which may be of assistance in determining the issues before the Court. Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to them in Trafigura’s Brief dated January 6, 2024.

## PART II – LAW AND ARGUMENT

2. Trafigura submits that the key issue in this application is whether the Trafigura Post-Filing Obligations and Cleo Post-Filing Obligations both constitute post-filing obligations therefore entitling it to its contractual right to set-off the Trafigura Post-Filing Obligations against the Cleo Post-Filing Obligations.
3. This Court dealt with an analogous case in *Blade Energy Services Corp (Re)*,<sup>1</sup> wherein a creditor/operator of a gas-plant sought, in the alternative, direction regarding its enforcement rights relating to the costs of operating the gas plant on behalf of the oil producer/debtor against the revenues generated therefrom subsequent to the debtor filing an NOI. Justice Lema found that it was not the role of the Court to dictate the parties’ going-forward arrangements and that the applicable contract, which was entered into prior to the debtor filing an NOI, between the creditor and the debtor should govern in the post-NOI era.<sup>2</sup>
4. In *Blade Energy*, the creditor/operator Conifer entered into an operating-procedure agreement with the debtor/producer Razor in relation to the operation of a gas plant. Approximately \$8 million in arrears arose relating to processing-charge and capital-cost shortfalls. After attempting to negotiate payment of the arrears, Conifer notified Razor that it intended to disconnect Razor from the gas-gathering system if it did not clear its arrears or agree to a payment plan.<sup>3</sup> Shortly after being locked out from the system, Razor filed an NOI. One of the issues raised in this application was whether Conifer’s enforcement set-off rights, granted in the operating-procedure agreement, were stayed regarding debts for services provided subsequent to the filing of the NOI. Notably, it was common ground that the operating-procedure agreement was not terminated as a result of Razor’s defaults or otherwise.
5. The key point in *Blade Energy*, which is relevant to the within Application, is that a creditor is entitled to set off its post-filing obligations against the post-filing obligations of the debtor even if those obligations arise from an agreement entered into prior to the filing of the NOI.<sup>4</sup> Accordingly, when it comes to services provided subsequent to the filing of an NOI, the debtor and creditor were found to have the same rights and liabilities under their agreements as before, without any limitations arising from, or

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<sup>1</sup> *Blade Energy Services Corp (Re)*, 2024 ABKB 100, 2024 CarswellAlta 356 (“**Blade Energy**”).

<sup>2</sup> *Ibid* paras 81, 91.

<sup>3</sup> *Ibid* paras 5 – 8.

<sup>4</sup> *Ibid* paras 93-94.

otherwise affected by, the Stay of Proceedings.<sup>5</sup> Justice Lema set out the relevant case law on this issue and the basis of his reasoning in his decision:

*5. Conifer's enforcement rights not stayed re debts for future services*

93 The critical point here is that Conifer's use and enforcement of its timing-of-payment and enforcement-of-payment rights, relating to future services, are not subject to the para 69(1)(a) stay.

94 The reason is simple: the NOI filing created two distinct eras, the period leading up to the filing and the period after. Claims existing in the first era are subject to the stay; claims arising in the second are not.

95 Here see *Canadian Petcetera Limited Partnership* (cited above):

[An earlier-described] interpretation of [s. 69\(1\)](#) is also demonstrated by the jurisprudence dealing with **new indebtedness incurred by a debtor after he or she has gone bankrupt**. It has been held that leave is not necessary for a creditor to have a remedy against the debtor because the **new indebtedness is not a claim provable in the bankruptcy**. (See *Richardson & Co. v. Storey* (1941), 1941 CanLII 334 (ON SC), [23 C.B.R. 145](#), [\[1942\] 1 D.L.R. 182](#)(Ont. S.C.); *Re Bolf* (1945), [26 C.B.R. 149](#)(Que. S.C.); *Venneri v. Bomasuit* (1950), [31 C.B.R. 150](#)(Ont. S.C.); and *Greenfield Park Lumber & Builders' Supplies Ltd. v. Zikman* (1967), [12 C.B.R. \(N.S.\) 115](#)(Que. S.C.). Also see *Wescraft Manufacturing Co. (Re)* (1994), 1994 CanLII 2883 (BC SC), [27 C.B.R. \(3d\) 28](#)(B.C.S.C.), which appears to have held, correctly in my view, that **s. 69.1(1) (the stay provision triggered upon the filing of a proposal) did not stay the termination of a lease on account of arrears of rent due after the filing of a proposal . . .** [para 31] [emphasis added]

96 [And \*Schendel Mechanical Contracting \(Re\)\* 2021 ABQB 893 \(Mah J.\):](#)

. . . it is known that Hatch **supplied goods** to various Schendel projects **during the post-NOI period** to the tune of \$34,476.75. Hatch advised the Receiver of which specific invoices to which the \$40,000 was applied. That information was not provided to the Court. It is known that apart from those specific invoices, there was a balance that was applied to indebtedness on the Paul Band School project, where one invoice related to the post-NOI period.

**The stay would not apply in respect of indebtedness arising from goods and services supplied to Schendel after the date of filing the NOI as such indebtedness would not be "a claim provable in bankruptcy" per [section 69\(1\): \*Wosk's Ltd Re\*, 1985 CanLII 624 \(BC SC\), 1985 Carswell BC 807 \(SC\), 58 CBR 312; 728835 \*Ontario Ltd., Re\*, 1998 CanLII 2019 \(ON CA\), 1998 CarswellOnt 2576, 3 C.B.R. \(4th\) 214.; and \*Jones, Re\*, 2003 CanLII 21196 \(ON CA\), 2003 CarswellOnt](#)**

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<sup>5</sup> *Ibid* para 97.

3184, 2003 CarswellOnt 3184, [2003] O.J. No. 3258. [paras 25 and 26] [emphasis added]

97 Accordingly, when it comes to future services, Conifer and Razor have the same rights and liabilities under their agreements as before i.e. without any limitations arising from or otherwise affected by the stay of proceedings.

98 It may be that Conifer will choose to proceed on the basis suggested by Razor (setoffs accompanied by deposit). Conifer might choose to rely on other payment-enforcement rights it has under the agreements i.e. as they may be triggered by Razor's payment performance or non-performance. The parties may end up agreeing to new or varied payment arrangements.

99 It is not the Court's role, in a stay-enforcement context, to get involved in those going-forward business decisions.<sup>6</sup>

6. In the present case, neither Trafigura or Cleo have argued that the Agreements have terminated and Trafigura has continued to meet its obligations thereunder with regards to the marketing and sale of Cleo's oil products. Trafigura is seeking analogous relief to that recognized in *Blade Energy* whereby it should be paid, by way of set-off or cash payment, for services provided subsequent to the Filing Date. It would be unjust to require Trafigura to continue marketing and selling oil on behalf of Cleo without receiving payment for these services.
7. In a subsequent related hearing, *Razor Energy Corp (Re)*, 2024 ABKB 553,<sup>7</sup> Justice Mah heard an application by Conifer for payment of post-filing obligations and a priming charge to secure payment for the services provided subsequent to Razor's filing of its NOI.<sup>8</sup> Notably, while Justice Mah did not grant the relief sought by Conifer in *Razor Energy*, the Court also did not dispute Conifer's right to set-off Razor's post-filing obligations<sup>9</sup> against revenues generated from continuing to operate the gas plant. The Court opined that Conifer was in an unwieldy predicament through no fault of its own and that the best available remedy to Conifer was setting off the amounts owed by Razor against the revenues Conifer generated on Razor's behalf via operation of the gas plant pursuant to the agreement between the parties.
8. The outcome of the application brought in *Razor Energy* reinforced the decision of Justice Lema in *Blade Energy* with regards to Conifer's entitlement to set-off for post-NOI amounts. Trafigura submits that the relief it is seeking is consistent with the findings of the Court in *Blade Energy* and *Razor Energy* and follows the precedent set down in those decisions that a debtor should be entitled to its bargained for set-off rights in relation to post-filing obligations.

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<sup>6</sup> *Ibid* paras 93-99.

<sup>7</sup> *Razor Energy Corp (Re)*, 2024 ABKB 553, 2024 CarswellAlta 2385 ("**Razer Energy**").

<sup>8</sup> *Ibid* para 2.

<sup>9</sup> *Ibid* paras 2, 9, and 16.

### **PART III – CONCLUSION**

9. Without the sought relief, Trafigura will be irreparably prejudiced, its contractually bargained for set-off rights will be rendered moot, and it will be required to pay for crude it purchased via the Agreements twice. Meanwhile, Cleo will receive all of the benefits under the Agreements without having to answer to the extensive set-off rights it promised to Trafigura in return. Such a finding would contradict the jurisprudence of this Court affirming a creditor's right to set-off for post-filing obligations without any limitations imposed by the Stay of Proceedings. As a result, Trafigura submits that the relief sought is reasonable and appropriate in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of January 2025.

**STIKEMAN ELLIOTT LLP**

Per: 

Karen Fellowes, K.C.

Counsel for the Respondent/Applicant,  
Trafigura Canada Limited

## TABLE OF AUTHORITIES

Tab No.	Description
1)	<i>Blade Energy Services Corp (Re)</i> , 2024 ABKB 100, 2024 CarswellAlta 356
2)	<i>Razor Energy Corp (Re)</i> , 2024 ABKB 553, 2024 CarswellAlta 2385